COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041572-04**

Deborah Dean	Employee
Access Nurses, Inc.	Employer
Commerce & Industry Ins. (AIG)	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Robert Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal brief
Charles E. Berg, Esq., for the employee at oral argument
James E. Ramsey, Esq., for the insurer at hearing
Christopher L. Maclachlan, Esq., for the insurer on appeal

CALLIOTTE J. The employee appeals from a decision awarding her a closed period of § 34 benefits, but allowing the insurer to take credit for "unemployment compensation disability" benefits paid by the state of California. The employee argues that the judge erred by: 1) failing to address her motion for an enhanced attorney's fee; 2) failing to award her interest pursuant to § 50; and 3) allowing the insurer to credit itself with the California benefits paid. We affirm the decision, addressing the second and third issues, and summarily affirming the first.

The employee, a California resident, worked for the employer, a nurse placement company, as a traveling nurse. On November 15, 2004, while on an assignment in Massachusetts, she fell and fractured her wrist while leaving her apartment for work. The judge found her injury noncompensable under the "going and coming rule." (Dec. I.)[1] In Dean v. Access Nurses, Inc., 23 Mass. Workers' Comp. Rep. 303 (2009), we held that the

[1] The first hearing decision, issued on May 6, 2008, will be referred to as "Dec. I." The second corrected hearing decision, issued July 8, 2014, will be referenced as "Dec. II." The transcripts of the first and second hearings will be called "Tr. I" and "Tr. II," respectively.

rule, which provides that an injury occurring when an employee is simply going to or coming home from work, has no application to the employee's situation as a traveling employee. We reversed the judge's finding on compensability, and recommitted the case for further findings on the extent of the employee's incapacity. Id.

At the recommittal hearing, no testimony was taken. The employee claimed § 34 or, alternatively § 35, benefits from November 15, 2004 until September 1, 2005, and §§ 13 and 30 medical benefits. The insurer raised disability and extent of incapacity, causal relationship, and proper notice, and sought credit for benefits paid in California.[2] The judge found the parties stipulated that the employee's average weekly wage was $1,200, and that the employee applied for and received "unemployment/disability benefits" from the state of California in the amount of $26,208, from November 22, 2004 until July 31, 2005. (Dec. II, 2.) Shortly after the issuance of the reviewing board's decision, the state of California filed a "Notice of Lien" on DIA form 115, for "unemployment compensation disability benefits" paid by the Employment Development Department (EDD). (Tr. II, 3-4.) The lien filed stated:

> Employment Development Department - unemployment compensation disability benefits. Paid $728.00 per week for the period 11-22-04 through 7/31/05 for a total of $26,208.00. Benefits paid for surgery to wrist 11/15/04. Benefits paid pursuant to CLIC 2629, LC 4904.

(Third Party Claim/Notice of Lien, filed December 7, 2009.)[3] At hearing, the insurer requested that the judge determine the type of benefits the employee had received from California so it would know how to offset them, (Tr. II, 15-16), while the employee contended that the lien became relevant only if the judge issued an award of benefits.

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[2] At the first hearing the employee testified to receiving "disability benefits from the state of California." (Tr. I, 35.) She agreed that, if she received any workers' compensation benefits, she had an obligation to reimburse the California agency in full. (Tr. I, 42; see also Tr. II, 15.) Employee's counsel did not necessarily agree with the employee's understanding that it was her responsibility to repay EDD. (Tr. II, 17.)

[3] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2006)(reviewing board may take judicial notice of documents within board file). Neither party sought to have the lien admitted as evidence.

(Tr. II, 16-17.) Both the employee and the insurer represented that they did not know whether the California benefits were unemployment benefits, workers' compensation benefits, or something else. (Tr. II, 4-5, 15-16).

The judge found the employee totally incapacitated as a result of her industrial injury from November 15, 2004 until August 31, 2005, when she returned to full-time work. (Dec. II, 9.) He ordered the insurer to pay her weekly § 34 benefits at the rate of $720 per week based on her average weekly wage of $1,200, for that time period, which was approximately five weeks longer than EDD had paid benefits. However, the judge also ordered that "the insurer credit itself with any California benefits paid." (Dec. II, 10.) He did not make findings regarding the nature of the California benefits.

Only the employee appeals, claiming error in the judge's order that the insurer credit itself with California benefits paid, seeking § 50 interest for all benefits awarded, and requesting an enhanced attorney's fee. Because benefits were awarded, the employee, for the first time, seeks a determination of the validity of the lien pursuant to G.L. c. 152, § 46A. Her original theory seemed to be that the judge erred by allowing the insurer to credit itself with the benefits paid by the California EDD because, without knowing what kind of benefits they were, the judge could not know how much, if any, of the California benefits should be credited. (Employee br. 19-20; Employee response br. 7-9.)

In her supplemental brief, after researching the California law, the employee took the position that the California benefits are neither workers' compensation nor unemployment benefits, but a separate benefit, designed, in part, to fill the gap between workers' compensation and unemployment benefits. (Employee sup. br. 2.) The employee acknowledged that the applicable California statutes do not permit individuals who later receive workers' compensation benefits to receive "unemployment compensation disability" benefits from EDD for the same period of time; in other words, California law does not allow a double recovery. Thus, the employee suggests that the insurer "should have computed the retroactive award, with interest, and then held back, the amount claimed by [EDD] . . . . pending a § 46A proceeding by the reviewing board

to determine the validity and amount of the lien." (Employee supp. br. 3; see also OA Tr. 14.) At oral argument, employee's counsel stated he wanted the reviewing board "to remand [the case] back to the judge for findings as to the nature of the EDD lien and whether it should be honored at all, in the first instance." (OA Tr. 16-17.) Employee counsel reiterated that he expected his client to be paid the money awarded by the administrative judge at hearing, "minus the amount claimed . . . by the EDD. That should be held back pending – to protect everybody, the employee, the insurer from ramifications if that lien is indeed valid." (OA Tr. 18.) Regardless of the validity of EDD's lien, the employee claimed entitlement to interest on the full amount of benefits awarded, but not timely paid, from November 15, 2004 until August 31, 2005. (Employee supp. br. 4.)

The insurer maintains there was no error in the judge's decision crediting the insurer with the California benefits already paid, notwithstanding the nature of those benefits. If the California benefits were unemployment benefits, G.L. c. 152, § 36B(1)[4] would bar payment of § 34 benefits for the same weeks California benefits were paid. If the California benefits were in the nature of workers' compensation benefits, pursuant to the well-established bar against double recovery, the amount paid in California should be credited against the Massachusetts award. See Lavoie's Case, 334 Mass. 403, 410 (1954). The insurer asserts in its supplemental brief that the California benefits were more akin to unemployment benefits, (Insurer supp. br. 7), and thus, the insurer had

[4] G.L. c. 152, § 36B provides, in relevant part:

> (1) No benefits shall be payable under section thirty-four or section thirty-four A for any week in which the employee has received or is receiving unemployment compensation benefits.
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> (2) . . . . Any unemployment compensation benefits received shall be credited against partial disability benefits payable for the same time period, or, if for a period of time for which partial disability benefits have already been paid, shall be credited against any future partial disability benefits which are or may become payable.

properly offset the benefits in that way.[5] The insurer disagreed that § 46A authorized the judge or this board to determine the validity or amount of the lien, as it applied only to a specifically enumerated group of lienholders, of which the California EDD was not one. (Insurer br. 13.) Although not disputing EDD's right, under California law, to reimbursement from the insurer, the insurer maintains that action lies in the Workers' Compensation Appeals Board in California, rather than here. (OA Tr. 36, 39.) Moreover, the insurer disputes that chapter 152 contains any provision for reimbursement of the California unemployment compensation disability fund. (Insurer supp. br. 7-8.) Finally, the insurer contends that it appropriately paid the five weeks of compensation over and above that paid by EDD, plus interest on those five weeks for eight years, for a total of approximately $7,500, and denies the employee has any right to § 50 interest on additional § 34 benefits ordered during the period EDD paid benefits. (OA Tr. 43, 49.)

We first address the California statutory scheme from which the "unemployment compensation disability" benefits arose. The California benefits were paid pursuant to that state's Unemployment Insurance Code ("UIC"), sec. 2601 et seq., as noted in the "Notice of Lien" filed with the DIA. In combination with workers' compensation benefits and unemployment insurance benefits, unemployment compensation disability benefits are,

> part of a comprehensive, integrated program of social insurance. . . calculated to alleviate the burden of a loss of wages by a protected employee during a particular period of time. . . . The significant aspect of this legislation concerns the fact that wages have been lost; the cause of such wage loss is the touchstone which determines which category of remedial legislation is germane. The workmen's compensation act, which mitigates the hardships experienced where a worker is injured in the course of his employment, the unemployment insurance act, which

[5] At oral argument, insurer's counsel stated the insurer credited itself with benefits paid in California, as if those benefits were unemployment benefits; i.e., it did not pay any workers' compensation benefits for the weeks the employee received Unemployment Compensation Disability benefits from California, 11/22/04 – 7/31/05, because the weekly benefits paid by EDD were higher than the workers' compensation benefits awarded in Massachusetts. The insurer paid benefits at the rate of $720 per week for the remaining five weeks of the order, which extended from 11/15/04 – 8/31/05, plus interest due on that amount pursuant to § 50, for a total of $7,500. (OA Tr. 19, 44.)]

> provides benefits to one unemployed because of lack of work, and the unemployment compensation disability insurance program, which protects the worker against nonoccupational disability, though distinct, are all component elements of a general, coordinated plan of social insurance developed by the Legislature.

California Compensation Ins. Co. v. Industrial Accident Comm'n, 276 P.2d 148, 152 (1954)(citations omitted). "[A]n employee is not entitled to unemployment compensation disability benefits in addition to workmen's compensation or unemployment insurance benefits for the same period of unemployment." Id., citing UIC, §§ 2628, 2629.

However,

> [w]hen the employer disputes that the worker's absence is due to a work-related disability, the injured worker is entitled to receive unemployment compensation disability from EDD during the period he or she is unable to work pending a final decision regarding the worker's compensation claim. (Unemp. Ins. Code, § 2629.1; Lab.Code § 4903, subds. (f) & (g).) EDD may file a lien for reimbursement of the [unemployment compensation disability] UCD with the Workers' Compensation Appeals Board. (Lab.Code, § 4903, subds. (f) & (g); § 4904, subds. (a) & (b).

California Ins. Guarantee Ass'n v. Workers' Compensation Appeals Board, 39 Cal.Rptr.3d 721, 723 n.1 (2006).

Thus, California's statutory scheme of "social insurance," California Compensation Ins. Co., supra, contemplates that an employee may file for both "unemployment compensation disability" benefits from EDD and workers' compensation benefits, and may collect EDD benefits pending a decision on eligibility for workers' compensation benefits. If workers' compensation benefits are awarded, either under California's statute, or the compensation statute of another state or the federal government,[6] EDD may file a lien with the Workers' Compensation Appeals Board. The

[6] Section 2629(a) of the UIC provides that an individual is not eligible for "disability benefits" from EDD "for any day of unemployment and disability for which . . . she has received, or is entitled to receive, 'other benefits' . . . ." " 'Other benefits' " means workers' compensation benefits under the law of California or of "*any other state* or of the federal government." § 2629(b)(1) (Emphasis added.)

California Labor Code ("LC"), § 4904, which is also referenced on EDD's "lien" filed with the Board, sets out the procedure for EDD to seek reimbursement before the California Workers' Compensation Appeals Board.

> Once the requisites are met, the [Workers' Compensation Appeals] Board is required to allow the EDD's lien. The EDD's allowed lien is then satisfied from either the employee's workers' compensation award, or the employer, or the workers' compensation insurance carrier that has assumed liability for reimbursement.

California Ins. Guarantee Ass'n v. Workers' Compensation Appeals Board, 12 Cal.Rptr.3d 12, 17 (2004)(citations omitted).

Although Massachusetts does not have the equivalent of California's "unemployment compensation disability" benefits, it does have a "public system of wage replacement," of which workers' compensation benefits are a part. Nason, Koziol & Wall, Workers' Compensation, § 25.1 (3rd ed. 2003). As in California, that system does not contemplate that an employee will be compensated twice for the same injury:

> [W]here the employee has received payments under another compensation act *or some other part of the public system of wage replacement,* or subject to certain qualifications, from group or non-group health or disability insurance, *some form of offset or reimbursement has been allowed, either by the court or the legislature*. The proliferation of various aspects of the overall social welfare system has given prominence to this issue of *equitable or statutory offset.*

Nason, Koziol & Wall, supra (emphases added)(footnotes omitted).

This bar against double recovery has long been reflected in Massachusetts case law and legislation. With respect to workers' compensation payments made in two states, the law is clear: An employee who has received workers' compensation benefits in another state may apply for and receive benefits in Massachusetts, "but the amount paid on [the] prior award in [the other] state will be credited on the second award." Lavoie, supra; McLaughlin's Case, 274 Mass. 217, 222 (1931)(because "[t]he employee cannot have double compensation," New Hampshire workers' compensation benefits must be deducted from a subsequent award under chapter 152). With respect to unemployment benefits, § 36B(1) provides that no § 34 or § 34A benefits may be paid for

the same weeks an employee receives unemployment compensation benefits. If an employee receives both § 35 partial incapacity benefits and unemployment benefits, the unemployment benefits are to be credited against the workers' compensation benefits; in other words, § 36B " 'calls for a dollar-for-dollar reduction in partial benefits.' " Piekarski v. Nat'l Non-Wovens, 16 Mass. Workers' Comp. Rep. 254, 259, quoting L. Locke, Workmen's Compensation, § 8.13, at 216 (Koziol Supp. 2000). Even prior to § 36B's enactment in 1985, the courts had recognized that the employee could not receive both workers' compensation and unemployment benefits for the same time period. Pierce's Case, 325 Mass. 649, 658-659 (1950); see Gallant's Case, 329 Mass. 607, 609 (1953)("[t]he board rightly refused compensation for the same period of time for which [unemployment] benefits had been received").[7]

The notable exception to this bar against double recovery is contained in G. L. chapter 152, § 38, which provides:

> Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee independent of this chapter shall be considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.

Here, the employee never argued below or in any of her briefs on appeal, that § 38 provides her with any relief. She has thus waived the right to do so.[8]

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[7] Other parts of this "public wage replacement system," also forbid double recovery. For example, where an employee is entitled to ordinary disability retirement benefits, accidental disability retirement benefits, or accidental death benefits, G. L. c. 32, §§ 6, 7 and 9, respectively, for the same injury for which she is entitled to workers' compensation benefits, her compensation benefits are offset against and payable in lieu of those pensions. See G. L. c. 32, § 14(2); see also Nason, Koziol & Wall, supra at § 25.14. Even where the employee is paid by a private accident or health insurer for a disability compensable under Chapter 152, the accident or health insurer is entitled to file a claim for reimbursement before an award of compensation benefits is made or a lump sum is approved. G. L. c. 152, § 46A; see also Nason, Koziol & Wall, supra at § 25.4. In addition, the definition of "All Payments Due an Employee" acknowledges that, where there are retroactive awards of benefits, the insurer must repay § 46A liens from the proceeds of retroactive awards. 452 Code Mass. Regs. § 1.02.

[8] Indeed, at oral argument, she expressly disavowed that her situation fits within the ambit of § 38. (OA Tr. 5-6.) We agree. We comment that the insurer's pre-emptive argument that § 38 is inapplicable is persuasive. (Insurer br. 12-13; Insurer supp. br. 3-4; OA Tr. 28-30.) In

Given the fundamental policy against double recovery, we think the judge's decision to allow the insurer to take credit for the stipulated amount of benefits paid in California was correct. It is not disputed that the EDD benefits were paid on account of the employee's work-related injury in Massachusetts, pending a determination regarding whether the employee was eligible for Massachusetts workers' compensation benefits.[9] In fact, the lien filed by EDD indicates that, in addition to weekly benefits, EDD also paid for surgery to the employee's wrist. As the court in Conte's Case, 51 Mass. App. Ct. 398 (2001), indicated, "where . . . the same injury is involved, compensation paid under the statute of another State is the equivalent of compensation paid under G. L. c. 152." Id. at 401.[10] Although the court was referring to workers' compensation benefits paid in

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Mizrahi's Case, 320 Mass. 733 (1947), the Supreme Judicial Court held that compensation payments received under the federal longshoreman's act, were not "savings or insurance of the injured employee," nor were they "benefits" as used in § 38. Id. at 737. "In that field [§ 38] should be broadly construed. But it cannot reasonably be supposed that it was intended to save to the employee the fortuitous advantage of receiving double compensation for the same injury or incapacity." Id. Interpreting a provision of California law "substantially similar" to § 38, a California appellate court relied on the holding in Mizrahi, supra, to find that the California provision was intended to exempt only the personal resources of the injured employee from offset. California Compensation Ins. Co., supra at 154-155. "[B]enefits received by the employee under a parallel act which is part of the pattern of wage-loss legislation" are not considered part of the private financial resources of the employee. Id. at 154. In a later decision, a California court made clear that payments made from the unemployment compensation disability fund were not "the workers' own wages," even though the employee contributed to the fund. California Ins. Guarantee Ass'n., 39 Cal.Rptr.3d at 726 n.7, citing California Ins. Guarantee Ass'n. v. Worker's Compensation Appeals Board, 12 Cal.Rptr.3d 12, 17 (2004). Accordingly, EDD benefits would be subject to the bar against double recovery under California law, California Insurance Guarantee Ass'n., 39 Cal.Rptr. 3d. at 726; California Compensation Ins. Co., supra at 154, and, by analogy, under Massachusetts law as well.

[9] There was no evidence presented regarding whether the employee applied for or was eligible for workers' compensation benefits in California.

[10] In Conte, supra, the court held that where both New Jersey and Massachusetts had jurisdiction of the employee's workers' compensation claim, and the Massachusetts insurer had been allowed to take credit for the New Jersey benefits initially paid, § 51A did not apply to further increase the employee's benefits. Section 51A provides that, "In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the

two states, we think the principle applies in a broader context, and that, "it would exalt form over substance," id., to require another insurer to pay the employee Massachusetts workers' compensation benefits for the same injury and same time period for which she received "unemployment compensation disability" benefits from California, where the amount of the Massachusetts workers' compensation benefits is less than or equal to the amount of EDD benefits received for the same time period. We think this is true even where there is no specific statutory authorization in Massachusetts addressing how receipt of benefits such as those paid by the California EDD are to be treated. Citing Pierce, supra, a Connecticut court explained:

> Coordination of these benefits sometimes presents a dilemma when the obvious legislative intent is to prevent dual benefits but a specific piece of *legislation contains no authorization or an ambiguous authorization for a reduction of benefits. It has been held, however, that even in the absence of an express clause, coordination must be achieved by assuming that all wage loss legislation is meant to be interpreted as consistent and harmonious with a general system.* Pierce's Case, [supra at 656]. In a unanimous decision . . . , the United States Supreme Court has also held that even in the absence of a specific limitation, the Employment Retirement Security Act must be interpreted as requiring a deduction from the benefits due under a private pension plan of those benefits due under a workmen's compensation act. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 516-17, 101 S.Ct. 1895, 1902-03 (1981). The court decided that there must be an integration of benefits, that is a pooling of payments due an employee. The question is whether two benefit systems have a similar purpose. If the two systems do, in terms of maintaining an income level, the workmen's compensation benefits should be offset against the benefits of ERISA.
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> Further, as a general rule, if two governmental benefits arise from the same cause, there cannot be entitlement to both benefits. Department of Employment Development v. Workers' Compensation Appeals Board, 61Cal.App.3d 470, 472-75, 131 Cal.Rptr. 204 (1976); Kment v. City of Detroit, 109 Mich.App. 48, 64, 311 N.W.2d 306 (1981); Johnson v. City of Muskegon, 61 Mich.App. 121, 127, 232 N.W.2d 325 (1975).

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date of the injury." The court held that, "under well-settled principles, compensation paid under the statute of another state is the equivalent of compensation paid under G. L. c. 152. . . ." Conte, supra.

City of Middletown v. Local Union No. 1073 of the Int'l Ass'n of Firefighters, AFL-CIO, 467 A.2d 1258, 1261 (1983).

Accordingly, we find no error in the judge's order that "the insurer credit itself with any California benefits paid." (Dec. 10.) Although the insurer took credit as if the EDD benefits were unemployment benefits, and did not pay during the weeks the employee received those California benefits, see G. L. c. 152, § 36B(1), even if the benefits were viewed as workers' compensation paid in another jurisdiction, the result would be the same in this case because the weekly EDD payment ($728) was more than was owed per week under G. L. c. 152, § 34 ($720).[11] (See Dec. 10.) The insurer here represented that it paid the employee compensation only for the time periods the employee did not receive EDD benefits, November 15, 2004 through November 21, 2004, and August 1, 2005 through August 31, 2005. This was appropriate.

We turn now to the lien filed by EDD. Although the parties stipulated to the amount of the EDD payments the employee received, (Dec. 2; Employee br. 4), permitting the judge to allow the insurer to take credit for such payments, the judge could not have otherwise addressed the validity of the 2009 lien filed by EDD or ordered the insurer to repay EDD, because neither of the parties sought to notify EDD of the proceedings before the Board, or to join EDD as a party. Thus, any order the judge might have made with respect to the disposition of the lien would have violated basic principles of due process requiring that, before issues affecting substantial rights of a party are litigated, that party be notified and given an opportunity to be heard. See Holden v. Town of Wilmington, 25 Mass. Workers' Comp. Rep. 165 (2011)(where correct insurer for second date of injury was neither notified, represented nor joined to claim, order against it violated due process). See generally, Haley's Case, 356 Mass. 678, 681 (1970). We do not determine whether, had EDD been given proper notice and a right to be heard, the judge could have adjudicated the lien, as that issue is not before us. In so holding, we

[11] We observe that had the weekly EDD benefits been less than the weekly benefits payable under § 34, the insurer would have been required to pay the difference to the employee in order to make her whole under § 34.

do not condone the insurer's receipt of a "windfall." To the contrary, principles of comity suggest that the lien be honored, and that the insurer reimburse EDD for the benefits it paid the employee. We hold merely that, under the circumstances presented, the judge did not err in failing to adjudicate the lien. [12]

Finally, we turn to the question of interest pursuant to Section 50.[13] The employee argues in her briefs that she is due § 50 interest on the total amount of benefits the judge ordered, (Employee br. 16-18; Employee supp. br. 4), regardless of whether the judge was correct in allowing the insurer to take credit for EDD benefits paid.[14] We disagree. Section 50 applies when "an order or decision requires that such payments be made."

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[12] We note that California law gives jurisdiction to the California Workers' Compensation Appeals Board to determine the validity and amount of the lien. (LC, §§ 4903, 4904.) We are aware of nothing in California law indicating any other method for adjudicating the lien. Further, we agree with the insurer that § 46A does not provide an avenue for dealing with the EDD lien, as it applies only to certain enumerated lienholders, of which the EDD is not one. However, we do not rule out the possibility that, under the appropriate circumstances the judge could have adjudicated the EDD lien, or that, as the employee has suggested, an action could be filed pursuant to the Interpleader provision of Mass. R. Civ. P. 22. (OA Tr. 25; E-mail to reviewing board May 18, 2015 from Attorney Berg.)

[13] General Laws c. 152, § 50, provides:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum on all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

[14] Despite arguing this issue in its briefs, when asked at oral argument if the question of § 50 interest was before the reviewing board, employee counsel answered that it was not. (OA Tr. 26.) Subsequent to the issuance of the judge's decision, the employee had filed additional claims for §§ 8(1), 14(1) and 13A, based on its contention the insurer had not paid the employee properly in connection with the hearing decision. (See Employee's claim dated 10/14/14.) Following a § 10A conference, a different administrative judge denied the claim. That claim has been put on hold pending the issuance of our decision. At oral argument, the insurer represented that the question of entitlement to § 50 interest on the amount paid by EDD was the only question remaining before the new judge. (OA Tr. 49.) We think the question of whether interest is due on the stipulated amount of EDD benefits, for which the judge allowed the insurer to take credit, is a question of law, and we therefore decide that issue.

The judge's order did not require that the insurer pay the employee § 34 benefits for the entire period he found her totally disabled (November 15, 2004 through August 31, 2005), but only required the insurer pay compensation benefits over and above those paid by EDD. Under these circumstances, an award of § 50 interest on the amount already paid by EDD would not be consistent with the legislative intention that "retroactive awards of compensation, insofar as they *exceed* periods of previously paid compensation . . . be paid with interest." Sloan, Jr.'s Case, 78 Mass. App. Ct. 121, 124 (2010)(emphasis added). Moreover, a requirement that the insurer pay interest on an amount the employee had timely received in lieu of compensation would not serve the "general purpose of providing for interest payments on awards, which is to compensate the claimant for the loss of use of his money, . . . so that a person wrongfully deprived of the use of money should be made whole for his loss." Id. The employee here was not deprived of the use of $26,208 paid by EDD. Thus, interest is not due on the lesser § 34 benefits awarded for the same time period.

The decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: ***May 5, 2016***

Catherine Watson Koziol
Administrative Law Judge